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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1818 September Term, 1981

James R. Shahady,

Petitioner

v.

Atlas Tile & Marble Company
and
Hartford Accident & Indemnity Co.,
and
Director, Office of Workers' Compensation Programs,

Respondents

United States Court of Appeals
for the District of Columbia Circuit

FILED Jul 22 1982

GEORGE A. FISHER
Clerk

BEFORE: MacKinnon, Edwards and Ginsburg, Circuit Judges

ORDER

Upon consideration of respondent's (Director, Office of Workers' Compensation Programs) motion for reconsideration of decision not to publish memorandum opinion, it is

ORDERED, by the Court, that the aforesaid motion for reconsideration is granted. The memorandum opinion will

be published and the Clerk shall take such action as is necessary to bring this about.

Per Curiam
FOR THE COURT:

/s/
GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1818 September Term, 1981
ARGUED 5-17-82

James R. Shahady,

Petitioner

v.

Atlas Tile & Marble Company
and
Hartford Accident & Indemnity Co.,
and
Director, Office of Workers' Compensation Programs,

Respondents

United States Court of Appeals
for the District of Columbia Circuit
FILED Jul 16 1982
GEORGE A. FISHER
Clerk

BEFORE: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Wilkey Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges

ORDER

Respondents' suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: /s/
Robert A. Bonner
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1818 — September Term, 1981
ARGUED 5-17-82

James R. Shahady,

Petitioner

v.

Atlas Tile & Marble Company
and
Hartford Accident & Indemnity Co.,
and
Director, Office of Workers' Compensation Programs,

Respondents

United States Court of Appeals
for the District of Columbia Circuit

FILED Jul 16 1982

GEORGE A. FISHER
Clerk

BEFORE: MacKinnon, Edwards and Ginsburg, Circuit Judges

ORDER

On consideration of respondents' petition for rehearing, filed July 2, 1982, it is

ORDERED by the Court that the aforesaid petition is denied

Per Curiam
FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: /s/
Robert A. Bonner
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1818 September Term, 1981

James R. Shahady,

Petitioner

v.

Atlas Tile & Marble Company
Hartford Accident & Indemnity
Company and Director, Office of
Workers' Compensation Programs,
United States Department of Labor,

Respondents

United States Court of Appeals
for the District of Columbia Circuit

FILED Jul 16 1982

GEORGE A. FISHER
Clerk

BEFORE: MacKinnon, Edwards and Ginsburg, Circuit Judges

ORDER

It is ORDERED by the Court, *sua sponte,* that the caption in the judgment and memorandum opinion issued June 4, 1982, in No. 81-1818 be, and it hereby is, amended to add the Director, Office of Workers' Compensation Programs, United States Department of Labor, as a named respondent. *See Shahady v. Atlas Tile & Marble, et al.*, No. 81-1818 D.C. Cir. February 26, 1982).

Per Curiam
FOR THE COURT:

GEORGE A. FISHER
Clerk
BY: /s/
Robert A. Bonner
Chief Deputy Clerk

APPENDIX E

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1818

JAMES R. SHAHADY, PETITIONER

v.

ATLAS TILE & MARBLE COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS *

Petition for Review of an Order of the Benefits Review Board

Argued May 17, 1982
Decided June 4, 1982

Judgment entered this date

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* The caption in this case was reformed in accordance with a decision of this Court that the Director of the Office of Workers' Compensation Programs of the United States Department of Labor should be a named respondent in all Benefits Review Board review proceedings. *See* Shahady v. Atlas Tile & Marble Co., 673 F.2d 479 (D.C. Cir. 1982).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Wayne M. Mansulla for petitioner.

William P. Dale for respondents Atlas Tile & Marble Company and Hartford Accident & Indemnity Company.

Marianne Demetral Smith, Attorney, Department of Labor, with whom *T. Timothy Ryan, Jr.*, Solicitor of Labor, and *Donald S. Shire*, Associate Solicitor, were on the brief, for respondent Director, Office of Workers' Compensation Programs.

Before: MACKINNON, EDWARDS, and GINSBURG, *Circuit Judges.*

Per Curiam:[1] James R. Shahady has petitioned this court under the Longshoremen's and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. §§ 901 *et seq.*, as applied to the District of Columbia, D.C. Code §§ 36-501 *et seq.*,[2] for review of an order of the Benefits Review Board (BRB) of the Department of Labor. The BRB, with one of the three administrative appeals judges dissenting, affirmed the decision of an administrative law judge (ALJ) denying Shahady's claim against his employer and its insurance carrier for medical expenses incurred as a result of a knee injury sustained in the course of employment. Shahady maintains that he is entitled under the Act to benefits covering treatment rendered by three physicians whose services he procured after his discharge by the doctor furnished by his employer.[3] We agree.

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[1] This opinion originally issued as a memorandum accompanying a judgment order; it is published at the request of the Director of the Office of Workers' Compensation Programs.

[2] Application of the Act to the District of Columbia has now been superseded by 36 D.C. Code §§ 301 *et seq.* (1981). *See* District of Columbia v. Greater Washington Central Labor Council, 442 A.2d 110 (D.C. 1982).

[3] Petitioner clarified at argument that he does not seek benefits covering medical expenses he incurred prior to his

Under section 7(d) of the Act, 33 U.S.C. § 907(d), an employee is not entitled to reimbursement for medical treatment or services *unless* he has requested his employer to furnish or authorize such treatment or services, and the employer has refused or neglected to do so. Shahady testified that he requested further treatment from Dr. Gibson, the surgeon who attended to his knee injury pursuant to the reference of his employer's insurance carrier. According to Shahady, Dr. Gibson told him "[he] was fine," "there was nothing wrong with [his] leg," and "to come back and see him in a year." Joint Appendix (J.A.) 91. Dr. Gibson acknowledged that he performed a final exam and discharged Shahady from continuing care, J.A. 108, but stated he would have seen petitioner for "[a]s long as he wanted to come." J.A. 107-108.

Taking into account the settled rule that in cases of this nature, "[d]oubts, including the factual, are to be resolved in favor of the employee," *Wheatley v. Adler*, 407 F.2d 307, 314 (D.C. Cir. 1968) (en banc), we conclude that Shahady's claim fits securely within judicial and BRB precedent interpreting section 7(d) to authorize benefits for necessary medical treatment an injured employee procures after discharge by an employer-furnished physician. When an employee is told by the employer's physician that "he is recovered from his injury and requires no further treatment, he has, in effect, been refused treatment by the employer," and is therefore entitled to reimbursment for all necessary treatment subsequently procured on his own initiative. *Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908, 911 (5th Cir. 1971). *See Buckhaults v. Shippers Stevedore Co.*, BRB No. 75-132, 2 BRBS 277 (1975); *see also Walker v. AAF Exchange Service*, BRB No. 76-185, 5 BRBS 500 (1977); *Kilson v. Sun Shipbuilding & Dry Dock Co.*, BRB No.

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treatment by the surgeon to whom he was sent by his employer's insurance carrier.

75-127, 2 BRBS 172 (1975). The BRB offered no cogent explanation for its apparent departure from this precedent.

We emphasize that the ALJ specifically found the treatment independently procured by Shahady within but a few months of Dr. Gibson's discharge "necessary" and "causally related" to petitioner's injury. J.A. 33. These findings are not disputed by the employer or its carrier; they appear irreconcilable with the ALJ's determination that Dr. Gibson's discharge of Shahady from continuing care did not operate as a refusal by the employer to provide the necessary care required under the Act. *See Washington v. Cooper Stevedoring Co.*, BRB No. 75-237, 3 BRBS 474, 479 (1976), *aff'd on other grounds*, 556 F.2d 268 (5th Cir. 1977) (misdiagnosis by the discharging physician is the "equivalent of a refusal of treatment by the employer").

We recognize that fact findings made in the administrative proceedings must be accepted unless unsupported by substantial evidence. *See Voris v. Eikel*, 346 U.S. 328, 333-34 (1953). On the record considered as a whole, however, we firmly conclude that the ALJ's determination that Shahady was not refused necessary treatment is unsupported by substantial evidence. We further conclude that, in sustaining this unsupported determination without distinguishing its own precedent pointing in the opposite direction, the BRB failed to act in accordance with basic tenets of administrative law. *See Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1025-26 (D.C. Cir. 1971). We therefore do not reach the question whether, in the absence of a refusal attributable to the employer to provide necessary medical treatment, the Act would have required Shahady to request his employer's authorization for the medical services in question. *See* 33 U.S.C. § 907(b), (d).

Finally, the ALJ refused to exercise his statutory discretion to excuse the apparent failure of Shahady's doc-

tors to comply with the Act's requirement that a report be filed with the employer within ten days following the first treatment. 33 U.S.C. § 907(d). However, as the BRB's own precedent again makes clear, failure to file a timely report should be excused where medical services are otherwise reimbursable due to the employer's refusal to provide necessary further treatment. *Buckhaults, supra* at 280. In light of our determination that Shahady is entitled to reimbursement under section 7(d), the ALJ's refusal to excuse the report-filing lapse constitutes an abuse of discretion.

For the reasons stated, the order on review is reversed.

So ordered.

APPENDIX F

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1818

JAMES R. SHAHADY, PETITIONER

v.

ATLAS TILE & MARBLE CO. and
HARTFORD ACCIDENT & INDEMNITY CO., RESPONDENTS

On Motion of Director, Office of Workers' Compensation Programs, to Amend and Reform Caption

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Argued December 3, 1981

Decided February 26, 1982

Judgment entered this date

Wayne M. Mansulla for petitioner.

William P. Dale for respondents.

Mark C. Walters, Attorney, Department of Labor, for movant Director, Office of Workers' Compensation Programs.

Before: WALD, MIKVA and EDWARDS, *Circuit Judges*

Opinion *Per Curiam.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

PER CURIAM: We decide here a discrete but important question: whether the Director of the Office of Workers' Compensation Programs ("DOWCP" or "Director") within the Department of Labor is a proper respondent to a petition for review of a decision of the Benefits Review Board ("BRB" or "Board") brought under section 21(c) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA" or "Act"), 33 U.S.C. § 921(c),[1] when the Director aligns himself with petitioner urging reversal of the Board's order. Because the statutory scheme of the LHWCA and regulations promulgated thereunder clearly contemplate that the Secretary or his delegate shall participate as a matter of course in section 921(c) review proceedings, we hold the Director should be named a party-respondent in all review proceedings brought under section 921(c), whether or not the Director supports the Board's order. Accordingly, we grant the Director's motion to amend and reform the caption in No. 81-1818.

I. BACKGROUND

Petitioner James R. Shahady filed an administrative claim against his employer Atlas Tile & Marble and its

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[1] Section 921(c) provides, in pertinent part:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified.

insurance carrier Hartford Accident & Indemnity for reimbursement of medical expenses for a second knee operation following a fall Shahady suffered in 1975 while employed by Atlas Tile as a marble mason. The Administrative Law Judge denied Shahady's claim in its entirety on November 29, 1979. The Benefits Review Board affirmed on June 11, 1981, with one judge dissenting. BRB No. 79-724, Case No. 79-DCWC-252. The Director did not actively participate at either stage of the administrative proceedings. Shahady filed a petition for review on July 22, 1981, D.C. Cir. No. 81-1818, naming as respondents only Atlas Tile & Marble and Hartford Accident & Indemnity.

The Director, Office of Workers' Compensation Programs, moved on August 12 to amend and reform the caption in No. 81-1818 to add as party-respondent the DOWCP. In support, the Director relies in general on the Secretary's delegation to the Director of the Secretary's duties of implementation, administration, and enforcement of the LHWCA. Specifically, the Director relies on 20 C.F.R. § 802.410(b), which provides that the DOWCP "shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA." The Supreme Court appears to have approved this regulation in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). There, the Court interpreted this regulation to "mak[e] it clear that the Director of OWCP is the proper federal party in a case of this nature." 432 U.S. at 256 n.11.

The named respondents present a host of arguments in opposition to the Director's position. Respondents first announce that the Director's real intent in this case is to intervene on behalf of petitioner Shahady wthout having taken any active part in the two-step proceedings within the Department of Labor. They argue that, as a movant for leave to intervene, the DOWCP must sat-

isfy the requirement of Fed. R. App. P. 15(d) (motion shall contain a concise statement of interest of movant and grounds upon which intervention is sought), as well as notions of "respondent standing" derived from *ITO Corp. of Baltimore v. BRB*, 529 F.2d 1080, 1089 (4th Cir. 1975), *refusal to substitute Director as respondent affirmed as amplified upon rehearing en banc*, 542 F.2d 903, 906-09 (1976), *cert. denied*, 433 U.S. 908 (1977). Neither the statutory scheme nor the regulation relied on by the Director impresses respondents. They concede only that if there were to be "a federal representative on appeal" the DOWCP would be the appropriate federal representative because of his general enforcement responsibilities under the Act. Concerning the regulation, 20 C.F.R. § 802.410(b), rspondents argue that it "does nothing more than clarify who is to represent the Secretary of Labor in appropriate circumstances, not to define those circumstances." They conclude that neither statute nor regulation automatically confers upon the DOWCP the status of party-respondent in all section 921(c) review proceedings. Rather, the Director must in each case demonstrate either that the Director's participation is necessary for proper administration of the Act or that the government was a party adverse before the Board. Respondents argue that in this case, the Director can show neither and therefore, that the Director's motion to amend the caption and any other attempt to participate in the case should be denied.

In reply, the Director cites Fed. R. App. P. 15(a): "In each case the agency shall be named respondent." Although acknowledging that the drafters of Rule 15(a) did not anticipate this precise situation, the Director assumes that the premise underlying the rule—that there must be *a* federal respondent in agency review proceedings—applies here. Because *the Board* is not a proper respondent in a section 921(c) review proceeding, *McCord v. Benefits Review Board*, 514 F.2d 198 (D.C. Cir.

1975), it follows by process of elimination that the DOWCP must be the proper federal respondent.

This important procedural issue has surprisingly not yet been decided in this court despite the frequency with which we are faced with petitions for review of orders of the Benefits Review Board.

II. Discussion

At the outset we acknowledge that no authority easily disposes of this motion. The statutory scheme and regulation upon which the DOWCP principally relies do not, in so many words, resolve this issue; the Supreme Court's statement on this point is also equivocal. The legislative history is unhelpful. Finally, Rule 15(a), if it applies at all, begs the question. Thus it is not surprising that the circuits have split almost evenly as to the proper role of the Director and Board in section 921(c) proceedings.[2] We now join the majority in holding that the Director should be named as federal respondent in all cases brought under section 921(c). We do so because we are convinced that this result is not only consonant with the legislative and regulatory scheme but comports best with common sense.

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[2] The decisions of court of appeals run the entire gamut of possibilities. The Director has been held to be a proper respondent by the Third and Fifth Circuits, Krolick Contracting Corp. v. Benefits Review Board, 558 F.2d 685, 689-90 (3d Cir. 1977) (Black Lung Benefits Act only); United Brands Co. v. Melson, 569 F.2d 214, 217 (5th Cir. 1978), held to be improper by the Fourth, ITO Corp. of Baltimore v. Benefits Review Board, 542 F.2d 903 (4th Cir. 1976) (*en banc*), *cert. denied*, 433 U.S. 908 (1977), and believed to be improper by the Second, Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 42-43 n.5 (2d Cir.), *aff'd sub nom.* Northeast Marine Terminals Co. v. Caputo, 432 U.S. 249 (1976). For the split over the question of the Board's role, *see* note 9 *infra*; concerning the split over whether the Director has standing to file a petition for review, *see* note 6 *infra*.

That Congress intended the Secretary to play an active role in implementing, administering and enforcing the LHWCA is manifest from a reading of the Act. *See especially*, 33 U.S.C. § 939. The Secretary has permissibly delegated this broad authority and substantial responsibility to the Director of the Office of Workers' Compensation Programs. 20 C.F.R. §§ 701.201, 701.202(a).[3] Because we believe the Director's central role in the legislative and regulatory scheme dictates in large part our result to grant the Director automatic status as federal party-respondent, we will briefly journey through the administrative and judicial review processes under the amended LHWCA and its regulations.

Claims under the Act are brought first to a deputy commissioner who, if necessary, may investigate the claim and order a formal hearing before an administrative law judge. 33 U.S.C. § 919(c), (d). Under section 939(c)(1),

> The [Director] shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The [Director] may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The [Director] shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

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[3] *But see* 20 C.F.R. § 1.2(d) ("[T]he Assistant Secretary has delegated authority and assigned responsibility to the Director, OWCP for the Department of Labor's programs under the following statutes: . . . (d) Longshoremen's and Harbor Workers' Compensation Act . . . *except 921 as it applies to the Benefits Review Board.*") (emphasis added). The language of this regulation openly conflicts with 20 C.F.R. § 802.410. We disregard the earlier regulation to the extent § 802.410 negates it.

Should a formal hearing be held, the Director (represented by the Solicitor of Labor) may appear and participate as "an interested party" as a matter of right. 20 C.F.R. § 702.333.

The Benefits Review Board is "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof." 33 U.S.C. § 921(b)(3). The Secretary's regulations make it clear that the Director is considered a party before the Board, whether or not the DOWCP actively participated in any formal hearing, and whether or not the Director is adversely affected thereby. 20 C.F.R. § 802.201(a) ("Any party adversely affected by a decision or order pursuant to [the LHWCA] may appeal . . . to the Board by filing a notice of appeal . . ."), *id.* § 801.2(10) (defining "party" as "the Secretary or his designee *and* any person or business entity *directly* affected by the decision or order from which an appeal to the Board is taken." Emphasis added.).

Review of final orders of the Board is had in the appropriate court of appeals upon the timely filing of a petition for review by "any person adversely affected or aggrieved" by such order. 33 U.S.C. § 921(c).[4] The Act, somewhat ambiguously, provides as well that

> Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

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[4] *See* note 1 *supra*. The Secretary's regulation provides that only a *party* adversely affected or aggrieved by the order of the Board may file a petition for review. 20 C.F.R. § 702.410(a).

33 U.S.C. § 921(a). The Secretary's regulation, however, specifically states that

> The Director, OWCP as designee of the Secretary of Labor responsible for the administration and enforcement of the [Act], shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA.

20 C.F.R. § 802.410(b). We believe the Secretary's regulation to be a clear and definite statement, consistent with the intent of the Act to allow the Director (as the Secretary's delegate) to participate at each stage of administrative and judicial review in order to ensure proper and consistent administration of the Act.[5]

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[5] We read § 921a simply to indicate that attorneys within the Department of Labor should represent Department officials involved in § 921(c) review proceedings, be it the Secretary (Director), deputy commissioner, or Board. Before the 1972 amendments, claims were brought before deputy commissioners. Judicial review was had by writ of injunction against the deputy commissioner in district court, with a right of appeal to the court of appeals. 33 U.S.C. § 921 (1970); DOWCP v. National Van Lines, 613 F.2d 972, 976 n.1 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980). The United States Attorney in the judicial district in which the case was pending represented the Secretary or deputy commissioner in district court and on appeal where either was a party to the case or an interested party. 33 U.S.C. § 921a (1970). *See* United Brands Co. v. Melson, 569 F.2d 214, 216 (5th Cir. 1978) (single-judge panel) (citing § 921a as evidence that the LHWCA "appears to contemplate government participation in review litigation"), Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 42-43 n.5 (2d Cir.) (dictum) (same), *aff'd sub nom.* Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1976). *But cf.* Prolerized New England Co. v. Benefits Review Board, 637 F.2d 30, 40-41 (1st Cir. 1980) (denying without prejudice DOWCP's motion to dismiss Board as party-respondent: "[T]he idea that the Board would appear in review proceedings under § 921 evidently was not wholly foreign to Congress, since at the same time it

This court has previously held that the Director's general supervisory and enforcement interest, apart from any pecuniary interest, is sufficient to confer upon the Director standing to file a petition for review under section 921(c). *DOWCP v. National Van Lines*, 613 F.2d 972, 977 n.6 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980).[6] We hold today that this interest as expressed in the legislative and regulatory scheme, and especially in 20 C.F.R. § 802.410(b), entitles the Director to participate as party-respondent as a matter of course in all section 921(c) petitions.[7] We note that the only state-

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created the Board, Congress amended § 921a . . . ."), *cert. denied*, 101 S. Ct. 3080 (1981); ITO Corp. of Baltimore v. Benefits Review Board, 542 F.2d 903, 906 (4th Cir. 1976) (*en banc*) (§ 921a begs the question), *cert. denied*, 433 U.S. 908 (1977).

The Secretary's regulation is the only sensible construction of the current § 921a in light of this and other courts' holdings that the Board (and a fortiori the deputy commissioner) is an improper respondent. *See* McCord v. Benefits Review Board, 514 F.2d 198 (D.C. Cir. 1975), and cases cited at note 9 *infra*.

[6] *Cf.* DOWCP v. Eastern Coal Corp., 561 F.2d 632, 645 (6th Cir. 1977) (administrative interest of Director in enforcing Black Lung Benefits Act sufficient to confer standing); DOWCP v. Alabama By-Products, 560 F.2d 710, 715-17 (5th Cir. 1977) (same); DOWCP v. Peabody Coal Corp., 554 F.2d 310, 332-38 (7th Cir. 1977) (same). *Contra* DOWCP v. Bethlehem Steel Corp., 620 F.2d 60, 63 (5th Cir. 1980) (no administrative interest in litigating issues concerning proper allocation of burdens of proof and persuasion under LHWCA); Fusco v. Perini North River Assocs., 601 F.2d 659, 660 (2d Cir. 1979) (no administrative interest under LHWCA), *vacated and remanded on other grounds*, 444 U.S. 1028 (1980); DOWCP v. Donzi Marine, Inc., 586 F.2d 377, 381-82 (5th Cir. 1978) (no administrative interest under LHWCA; distinguishes Black Lung Benefits Act cases).

[7] Two possible objections that come to mind may be quickly dismissed. First, the DOWCP did not actively participate at either stage of the administrative proceedings, although entitled to do so by regulation. Generally, failure to participate

ment of the Supreme Court on point, *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 256 n.11 (1976), while dictum and not entirely unambiguous, is basically in accord with our holding.[8]

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before the agency is fatal to one who seeks to participate on appeal. But that rule is inappropriate here. As a practical matter, it would be impossible for the DOWCP, with its limited resources, to actively participate before the ALJ and BRB in every case. It would be grossly inefficient to require the DOWCP to participate at the agency level in order to participate in the court of appeals, or even to move to intervene where not made a party. In any event, we believe Congress intended the Secretary's designate to participate in administrative and judicial proceedings where and when he believed it necessary.

Second, it may at first blush seem illogical to allow a respondent to side with petitioner. This is often the case, however, where the United States as statutory respondent argues on behalf of petitioner in urging reversal of some agency action. The prospect of a caption reading "DOWCP, et al. v. DOWCP, et al." can be avoided simply by the Director refraining from naming itself as respondent in any petition for review he chooses to file.

[8] *Northeast Terminal* came up on certiorari to the Second Circuit, where the Director—at that time without the benefit of 20 C.F.R. § 802.410(b) and burdened with 20 C.F.R. § 1.2(d), *see* note 3 *supra*—failed to persuade the Second Circuit that the DOWCP, not the Board, should be the proper federal respondent in § 921(c) proceedings. The court of appeals stated in dictum,

> Trying to make sense out of these regulations, we think that while the Director, OWCP is a proper party before the ALJ or the BRB . . . , the BRB is the proper agency respondent for review in the court of appeals . . . . We deem it best to defer resolution of this question to a case where decision on this point is essential; perhaps in the meanwhile the Department will tidy up its regulations.

Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 43 n.5 (1976). It was in response to this suggestion that the

In so holding, we choose not to rely on Rule 15(a) as the Director urges us to do. In *McCord v. Benefits Review Board*, 514 F.2d 198 (D.C. Cir. 1975), this court granted the Board's unopposed motion to dismiss itself as a respondent in a section 921(c) review proceeding. The court stated that the rationale of Rule 15(a) does not apply to this type of proceeding.

> Normally, a single private party is contesting the action of an agency, which agency must appear and defend on the merits to insure the proper adversarial clash requisite to a "case or controversy." . . . Here, there is sufficient adversity between [the employer] and [the claimant] to insure proper litigation without participation by the Board. To require the Board to appear as a party would parallel requiring the District Court to appear and defend its decision upon direct appeal.

514 F.2d at 200. The court listed as another reason for dismissal a corollary of the first: the court could carry out its judgment and order without any further action required of the Board. *Id.* In this case, too, there is "sufficient adversity" between petitioner Shahady and the named respondents to ensure a "case or controversy." Rule 15(a) contemplates that the agency respondent defend the agen-

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Secretary promulgated 20 C.F.R. § 802.410(b). The Supreme Court, presented with the recently issued regulation, stated:

> The Court of Appeals questioned whether the [DOWCP], the federal respondent here, was a proper party in the Court of Appeals. . . . It concluded that some federal participation was proper and did not reach the question whether the BRB should have been substituted for the Director. . . . [N]either party has raised any question in this Court concerning the identity of the federal respondent. ***This question is therefore not before us.*** The Department of Labor has recently promulgated a regulation ***making it clear that the Director of OWCP is the proper federal party in a case of this nature.***

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 256 n.11 (1976) (emphasis added).

cy's (commission, or board) decision because the respondent *represents* the agency. In LHWCA cases, the Benefits Review Board—as a purely adjudicative entity—functions as a district court.[9] There is no *necessary* identity of interest between the BRB and DOWCP. The Director decides independently to support the Board's order, and if so, to what extent and in what manner.

The Director argues that if the Board is not a proper federal respondent, then the DOWCP must be. We disagree. The reasoning of *McCord*—that the rationale of Rule 15(a) is inapplicable to this kind of situation—applies as much to the DOWCP as it does the Board. We

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[9] Most other courts that have dismissed the Board as respondent have followed the reasoning of *McCord*. *See, e.g.*, DOWCP v. Eastern Coal Corp., 561 F.2d 632, 648-49 (6th Cir. 1977) ("Just as a District Court is not a necessary party in this court for review of its decision, we hold the Benefits Review Board is likewise not a necessary party to this litigation."); Nacirema Operating Co., Inc. v. Benefits Review Board, 538 F.2d 73, 75 (3d Cir. 1976) (Board now performs the function which prior to 1972 LHWCA amendments was performed by a district court; Board, like the district court, has no duty or interest in defending its actions on appeal); ITO Corp. of Baltimore v. Benefits Review Board, 529 F.2d 1080, 1089 (4th Cir. 1975) (sufficient adversity between employer and claimant; Board's participation unnecessary to ensure proper litigation), *dismissal of Board noted and left undisturbed upon rehearing en banc*, 542 F.2d 903, 907 n.4 (1976), *cert. denied*, 433 U.S. 908 (1977); Offshore Food Service and Aetna Cas. Surety Co. v. Benefits Review Board, 524 F.2d 967 ("Neither [§ 921(c) nor Rule 15(a)] requires the Board to be a party nor is its presence as a party necessary to effectuation of orders this court may enter.").

Only one circuit has relied on Rule 15(a) in holding the Board to be a proper respondent. Prolerized New England Co. v. Benefits Review Board, 637 F.2d 30, 40-41 (1st Cir. 1980). Notably, the DOWCP also participated in that case as party-respondent. The only other decision in conflict with the reasoning of *McCord* is *Pittston Stevedoring*, discussed *infra* at 13.

agree with Judge Friendly; we too "find it hard to believe that . . . Congress [in the 1972 LHWCA amendments] meant to oust the Government from participation as of right." *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 43 n.5 (2d Cir. 1976), *aff'd sub nom. Northwest Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). But we believe that the Act, not Rule 15(a), dictates our conclusion that *the Director* shall be named as federal party-respondent in section 921(c) proceedings.

III. Conclusion

We hold that the Director, OWCP shall be named as federal party-respondent in all petitions for review brought under section 21(c) of the LHWCA, 33 U.S.C. § 921(c), regardless of the level or degree of active participation of the Director before the Board. The Director may freely elect either to support the Board's decision and order, in whole or in part, to side with petitioner and urge reversal, or to refrain from taking a position. The Director's motion to amend and reform the caption in No. 81-1818 is therefore granted.

APPENDIX G

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 79-724

JAMES SHAHADY
Claimant-Petitioner

v.

ATLAS TILE & MARBLE

and

HARTFORD ACCIDENT & INDEMNITY COMPANY
Employer/Carrier
Respondents

FILED AS PART OF THE RECORD

JUN 11 1981
(date)

/s/
Clerk
Benefits Review Board

DECISION and ORDER

Appeal from the Decision and Order of Robert A. Briggs, Administrative Law Judge, United States Department of Labor.

Wayne M. Mansulla, (Ashcraft & Gerel), Washington, D.C., for the claimant.

William P. Dale, (McChesney & Pyne), Washington, D.C., for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER* and KALARIS, Administrative Appeals Judges.

*Separate opinion by MILLER, Administrative Appeals Judge, to follow.

KALARIS, Administrative Appeals Judge:

This is an appeal by claimant from the Decision and Order (79-DCWC-252) of Administrative Law Judge Robert A. Briggs pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501 *et seq.* (hereinafter, the Act). Claimant appeals the administrative law judge's decision not to award to claimant payment for the medical services rendered by three physicians, Drs. Pecson, Schuster, and Edelson.

Claimant injured his left knee on November 19, 1975, while engaged in his employment as a marble mason. About one week after the injury, claimant came under the care of his family physician, Dr. Pecson. However, as claimant's knee worsened, claimant's employer, Atlas Tile and Marble (hereinafter, employer), referred claimant to Dr. Gibson, who thereafter performed surgery on claimant on April 2, 1977. Dr. Gibson continued to treat claimant until April 1978, when claimant and Dr. Gibson experienced some "unpleasantness." After this "unpleasantness," claimant once again sought treatment from Dr. Pecson. On advice of Dr. Pecson, claimant was operated on by Dr. Schuster.[1] Claimant continued to see both Drs. Pecson and Schuster after the operation.

The administrative law judge held that, even though Dr. Pecson was claimant's "initial free choice," employer was not liable for these medical expenses because claimant had not requested that employer authorize treatment by Dr. Pecson, as provided in Section 7(d) of the Act. 33 U.S.C.

[1]Dr. Edelson assisted Dr. Schuster in the operation on claimant.

§ 907(d). The administrative law judge denied claimant payment of the medical expenses of Drs. Schuster and Edelson because claimant had failed to obtain a written consent to change physicians as required by 20 C.F.R. § 702.406. The administrative law judge also found that none of the physicians had properly filed medical reports, as required by Section 7(d).

Claimant has advanced several arguments in his appeal of the administrative law judge's decision not to award payment of the medical expenses. However, review of both claimant's arguments on appeal and the Decision and Order of the administrative law judge reveals that there are three issues involved in this appeal: whether employer was absolved of its obligation to pay for medical services rendered to claimant because of claimant's failure to obtain prior authorization; whether certain alleged actions by employer's physician and insurance carrier constituted a refusal by employer to provide further medical care; and whether the administrative law judge properly refused to excuse the failure of the physicians who treated claimant to file the required medical reports.

We note initially that the Board's scope of review is limited. Therefore, where the findings and conclusions of the administrative law judge are supported by substantial evidence in the record considered as a whole, are not irrational, and are in accordance with law, they must be affirmed by the Board. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As a general rule, an employer is responsible for furnishing medical services and supplies that may be required as the result of a work-related injury. *See* 33 U.S.C. § 907(a). However, Section 7(d) conditions a claimant's

recovery of medical expenses on the occurrence of one of three events provided that the required physician's report is filed or failure to file is excused: the claimant requests that the employer furnish medical treatment and the employer refuses or neglects to do so; or the claimant requests that the employer authorize medical treatment by a physician chosen by the claimant and the employer refuses or neglects to do so; or the nature of the injury requires immediate medical treatment and the employer, having knowledge of the injury, neglects to provide or authorize treatment.[2] Where the employer refuses or neglects to provide medical treatment when requested, or refuses to authorize treatment upon request, and the claimant thereafter procures necessary medical treatment, the employer must bear these expenses. *See* 33 U.S.C. § 907(d).

The controversy in the instant case revolves around the payment for medical treatment provided by physicians

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[2]Employer's obligations in an emergency situation are further defined in 20 C.F.R. §§ 702.405 and 702.421. In his dissent in *Jackson v. Navy Exchange*, 9 BRBS 437, BRB No. 77-374 (1978), Administrative Appeals Judge Miller argued that an employer was liable for any medical treatment, including treatment that claimant did not request in advance, if this treatment was subsequently found necessary, the employer had knowledge of the injury, and the employer neglected to provide or to authorize such treatment. *Jackson*, 9 BRBS at 440. However, as indicated earlier, it is the majority's opinion that an employer's obligation to furnish medical treatment is conditioned upon claimant's requesting either treatment or authorization for treatment, except in the case of an emergency. In the instant case, the administrative law judge found, and substantial evidence in the record supports the finding, that no emergency situation existed. We, therefore, need only address the prior authorization requirements of Section 7(d) in this case. *O'Keefe, supra.*

chosen by claimant himself. We first address the issue of whether, under the facts of this case, claimant was required to request authorization from employer prior to obtaining medical treatment. Claimant argues that, as Dr. Pecson was his "initial free choise" pursuant to Section 17(b) of the Act and 20 C.F.R. § 702.406, there was no requirement that claimant obtain authorization prior to seeking Dr. Pecson's services. While the administrative law judge agreed that Dr. Pecson was claimant's "initial free choice," Judge Briggs nevertheless denied payment of these medical expenses since claimant had failed to obtain authorization prior to seeing Dr. Pecson. Citing decisions from the Courts of Appeals for the Fourth and Ninth Circuits, the administrative law judge held that Section 7(d) provides that a claimant is not entitled to recover payment for any medical expenses unless the claimant has first requested that employer "authorize provision of medical or surgical services by the physician selected by the employee and the employer shall have refused . . ." *See Maryland Shipbuilding and Dry Dock Co. v. Jenkins,* 549 F.2d 404, 10 BRBS 1 (4th Cir. 1979), *Nardella v. Campbell Machine, Inc.,* 525 F.2d 45, 3 BRBS 78 (9th Cir. 1975). *See generally Jackson v. Navy Exchange,* 9 BRBS 437, BRB No. 177-374 (1978).

We agree with the administrative law judge that claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to seeking recovery for the medical services of that physician. As it is clear from the facts of the instant case that none of the conditions of Section 7(d) had been met, we conclude that the administrative law judge's decision denying payment of Dr. Pecson's medical services because of claimant's failure to obtain authorization prior to see-

ing Dr. Pecson,[3] is supported by substantial evidence and is in accordance with law. *O'Keeffe, supra.*

We realize that our decision today is not in accord with the Board's earlier decision in *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, BRB No. 78-154 (1978). However, in *Bulone,* the applicability of Section 7(b) was erroneously considered without any reference to Section 7(d). Therefore, to the extent that *Bulone* is inconsistent with our determination in the instant case, *Bulone* is overruled.

As concerns the medical services of Dr. Schuster, claimant argues that they should be viewed as an extension of the services rendered by Dr. Pecson. Being under the impression that no prior authorization was required before seeking the services of Dr. Pecson, claimant's "initial free choice," claimant takes the position that no prior authorization was required before seeing Dr. Schuster either. We have held herein that, although Dr. Pecson was claimant's "initial free choice," claimant was nevertheless

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[3]It is obvious that Dr. Pecson was claimant's "initial free choice" after his injury. However, as to claimant's return to Dr. Pecson after the "unpleasantness" with Dr. Gibson, it is not certain whether Dr. Pecson remained claimant's "initial free choice" or whether this should be viewed as a "change of physicians." While under certain circumstances this difference in terminology could be significant, we believe that in the instant case it is unnecessary to address this difference for two reasons. First, regardless of whether these latter visists to Dr. Pecson are termed part of claimant's "initial free choice" or a "change of physicians," claimant was obligated to obtain some form of authorization from employer, which, in either event, claimant failed to do. Secondly, as an alternative reason, the administrative law judge denied payment of the medical services rendered by Dr. Pecson because Dr. Pecson failed to file the necessary medical reports. The failure to file these reports is sufficient by itself to support the denial of the payment.

obligated to obtain authorization prior to seeing Dr. Pecson. Thus, even if we view Dr. Schuster's services as an extension of Dr. Pecson's services, claimant failed to obtain the required authorization. Moreover, in *Nardella, supra,* the Ninth Circuit rejected claimant's argument that no additional authorization was required before receiving treatment from physicians to whom claimant had been referred by his "primary physician." *Nardella,* 3 BRBS at 82. Although *Nardella* was a pre-amendment case, we agree with the result reached therein and consider the rationale of that case equally applicable to the amended Section 7(d). Additionally, we agree with the administrative law judge that reimbursement for the services rendered by Drs. Schuster and Edelson should be disallowed since claimant failed to obtain a written consent to change physicians as required by 20 C.F.R. § 702.406. *And see* 33 U.S.C. § 907(b).

Claimant further argues that there are acts attributable to employer, each of which would constitute a refusal by employer to provide further medical care, and, thus, negate claimant's obligation to obtain authorization prior to seeking medical treatment. As earlier noted, if a claimant requests the employer to furnish medical treatment or services, or to authorize such treatment by a physician selected by claimant, the employer must bear the costs of such treatment. The Board, however, has concluded that, under certain circumstances, the actions of an employer can be tantamount to a refusal by the employer to either provide treatment or to authorize treatment. When the actions of an employer are such that they are tantamount to a refusal, the claimant is thereby entitled to payment or reimbursement for any subsequently obtained treatment. *See Rogers v. Pal Services,* 9 BRBS 807, BRB No. 77-636 (1978) (employer's physician's discharge of claimant, who

was nevertheless still disabled, held tantamount to a refusal by employer to provide further treatment); *Washington v. Cooper Stevedoring Co.*, 3 BRBS 474, BRB No. 75-237 (1976), *aff'd sub nom. Cooper Stevedoring of Louisiana v. Washington*, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977) (employer's physician's misdiagnosis held tantamount to a refusal to provide further medical treatment). *See also Mitchell v. Sun Shipbuilding & Dry Dock Co.*, 7 BRBS 215, BRB Nos. 77-1205 (3d Cir. Nov. 17, 1978).

In the instant case, claimant argues that the unpleasantness which occurred between Dr. Gibson and himself was tantamount to a refusal by employer to provide further medical care. However, there is a conflict in the testimony over the degree of this unpleasantness. The administrative law judge held that this unpleasantness did not constitute a refusal by employer to provide further medical care. Decision and Order at 4. Substantial evidence supports the administrative law judge's finding, and we therefore affirm.[4] *O'Keeffe, supra.*

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[4]Claimant also "tangentially" notes that Dr. Gibson "may be guilty of medical malpractice," citing *Washington v. Cooper, supra,* which held that a misdiagnosis was a refusal under the Act. Our examination of the record below reveals that claimant elicited evidence on the competency of Dr. Gibson's treatment of the purpose of establishing claimant's dissatisfaction with Dr. Gibson's treatment on the theory that under such circumstances claiamnt would not be required to continued under the care of Dr. Gibson. Hearing Transcript, pp. 90-91. We agree with employer that claimant's argument is irrelevant to the question of whether the proper statutory and regulatory procedures were satisfied in obtaining medical treatment. *Id.* Further, the phraseology of claimant's argument indicates that a finding of medical malpractice is not and cannot be seriously pressed on appeal, nor was the evidence below developed to that end. For these reasons we reject claimant's argument.

Claimant also contends that, in his visit to Dr. Gibson during which the unpleasantness occurred, claimant requested further treatment from Dr. Gibson, but was told that he had recovered from his injury and required no further treatment, thus constituting an effective refusal under the Act. The administrative law judge found that, with regard to Dr. Gibson, there was no refusal by employer to provide medical care. We have reviewed the record as a whole and find that there is substantial evidence to sustain the administrative law judge's conclusion. *See* Hearing Transcript, pp. 70-71, 78, 80; Cl. Ex. 6, Report of Dr. Gibson, April 14, 1978. We affirm. *O'Keeffe, supra.*

Finally, in his attempt to establish a refusal by employer to provide further medical care, claimant cites two occasions in which employer's insurance carrier refused to authorize medical services. Claimant argues that, on these occasions, when he was being admitted to Doctor's Hospital, the hospital telephoned employer's insurance carrier and inquired as to whether the carrier would authorize the scheduled treatment. On both occasions, the carrier refused to authorize the treatment. Claimant maintains that these two incidents constitute requests for authorization by employee and refusals by employer, thus satisfying the prior authorization requirement for the treatment requested and the requirement of a "refusal" by employer to provide further care.

We are, however, unable to accept this third argument advanced by claimant. The administrative law judge found that, with respect to the hospital admissions, there was no request by claimant to the employer or carrier for the prior furnishing of such services. Decision and Order at 3. We hold that there is substantial evidence in the record to sustain this finding. The only record evidence of these requests by the hospital personnel is claimant's bare

allegation that the telephone calls were made. Hearing Transcript, pp. 82, 86. Moreover, even assuming that the requests were made, there is no evidence that the telephone calls apprised employer or carrier that the hospitalization was for claimant's work-related injury to his left knee. As employer notes in its brief, claimant had a prior right knee injury and compensation case arising out of an injury that occurred in 1974 with another employer and carrier. Thus, there is not sufficient evidence of the contents of the two telephone calls made by Doctor's Hospital to show that the insurance carrier knew that it was being requested to authorize treatment for an injury for which it was responsible. Under these facts, the insurance carrier's refusal to authorize treatment should not now be the basis for finding the carrier liable. Accordingly, we affirm the administrative law judge's finding that the provisions of Section 7 were not complied with, and thus employer is not chargeable for the medical treatment that claimant subsequently obtained.

In addition to denying the claim for payment of the medical services because claimant had failed to obtain the required prior authorization, the administrative law judge also denied the claim because none of the physicians complied with Section 7(d) in regard to the filing of the required medical reports. Section 702.422(a), 20 C.F.R. § 702.422(a), premises an employer's liability for payment of medical services on the receipt by employer and the deputy commissioner of a medical report from the attending physician within 10 days following the date of the first treatment. In the instant case, the evidence discloses that Drs. Pecson and Edelson never filed the medical reports required by Section 7(d) and, although Dr. Schuster did file an Attending Physician's Report with the deputy commissioner, this report was filed three months

after the initial treatment and surgery. Under the provisions of Section 702.422(b), 20 C.F.R. § 702.422(b), the Secretary of Labor has delegated to the administrative law judge the authority to excuse the failure to file the required medical reports within 10 days.

The arguments raised by claimant in his attempt to establish that employer acted in a manner that was tantamount to a refusal to provide further medical treatment are also asserted as reasons to excuse the failure of the physicians to properly file the required reports. However, we have already considered these arguments and determined that the administrative law judge did not abuse his discretion in finding that none of the acts cited by claimant constituted a refusal by employer to provide or authorize medical treatment. Therefore, the rationale of *Buckhaults v. Shippers Stevedoring Company*, 2 BRBS 277, BRB No. 75-132 (1975) (employer's refusal of further medical care held to negate the finding that failure to file the required medical report was unjustified) is inapposite. Accordingly, we affirm the administrative law judge's finding that there is ". . . no basis for excusing the failure of the respective attending physicians to properly submit the report(s) required by the statute." Decision and Order, slip op. at 4. This noncompliance mandates a denial of the request for payment of the medical services.

Lastly, claimant argues that the Section 20 presumption applies to the issue of the filing of the medical reports required by Section 7(d). Claimant maintains that compliance with Section 7(d) must be presumed unless and until employer fulfills its burden of proving noncompliance with the Act. Claimant also argues that, since employer did not raise the issue of the "timeliness" of Dr. Schuster's reports before the administrative law judge, it was improper for the administrative law judge to raise this issue

on his own.[5] Moreover, claimant argues that, since employer failed to raise the "untimeliness" defense before the administrative law judge, employer cannot raise this issue for the first time on appeal.

First, it has been held that the filing of the medical reports as required by Section 7(d) is not included within the Section 20 presumption. *Maryland Shipbuilding and Dry Dock Co. v. Jenkins, supra* at 407. Secondly, in his opening statement counsel for employer specifically brought to the court's attention the regulation concerning the "effect of failure to report on medical care after initial authorization." Hearing Transcript at 34. Further, on October 22, 1979, three days after the hearing, claimant was directed by the administrative law judge to file any attending physician's reports or reports of initial treatment and any letter or other request made to employer/carrier to provide medical treatment or services. ALJ Ex. 1. Claimant's reply to this request was a reference to the reports of Dr. Pecson. Cl. Ex. 14. However, counsel for employer responded to this request by indicating that Employer's Exhibit 4 was an Attending Physician's Report of Dr. Schuster and noted that this report had been dated three months after the first treatment. Emp. Ex. 11.

Under these circumstances, we hold that the issue of compliance with Section 7 in regard to the medical reports was properly before the administrative law judge and all parties had a sufficient opportunity to address this issue.

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[5]In making this argument, claimant only refers to Dr. Schuster's failure to submit the required reports within 10 days as required by the Act. Claimant offers no explanation as to why this argument was not extended to include Dr. Pecson's and Dr. Edelson's failure to comply with Section 7. We will address this argument as if it applied to all three physicians.

Accordingly, we affirm the decision of the administrative law judge denying claimant's claim for payment of the medical services rendered by Drs. Pecson, Schuster and Edelson.

SO ORDERED.

/s/
ISMENE M. KALARIS
Administrative Appeals Judge

I Concur:

/s/
SAMUEL J. SMITH, Chief
Administrative Appeals Judge

APPENDIX H

BENEFITS REVIEW BOARD

U.S. DEPARTMENT OF LABOR

No. 79-724

JAMES SHAHADY
Claimant-Petitioner

v.

ATLAS TILE & MARBLE

and

HARTFORD ACCIDENT AND INDEMNITY COMPANY
Employer/Carrier-Respondents

FILED AS PART OF THE RECORD
SEP 21 1981
(date)
Agnes Kurtzman/KW
Clerk
Benefits Review Board

SEPARATE OPINION

MILLER, Administrative Appeals Judge, dissenting:

I must object to my colleagues' denial of claimant's request for the payment of medical services rendered by Drs. Pecson, Schuster, and Edelson. Preliminarily, I would find employer liable pursuant to Section 7(b) and 20 C.F.R. § 702.406 for the costs of treatment supplied by Dr. Pecson.

As the administrative law judge noted, Dr. Pecson was claimant's initial choice of physician. This fact alone should establish employer's responsibility for the fees associated with Dr. Pecson's treatment, since "claimant is entitled to an initial free choice of a physician with no need

of authorization. . . ." *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, 517 BRB No. 78-154 (1978)l. Howver, my colleagues, offering no rationale therefor, have determined that their *Bulone* decision is erroneous and that the Act mandates authorization prior to seeking treatment from the physician of claimant's initial free choice. In doing so, the majority disregards the judicial doctrine of *stare decisis*, the foundation of which, as noted in my dissenting opinion in *Clites v. Jones & Laughlin Steel Corp.*, 2 BLR 1-1019, BRB No. 79-358 BLA (1980), "is to insure that parties can place great reliance on the past decisions of an adjudicator as indicative of future decisions in a similar case. . . ." 2 BLR at 1-1028. Claimant has demonstrated his reliance on *Bulone*. *See* claimants Memorandum of Points and Authorities at 10. Accordingly, "[w]hen rights have been created. . .in reliance on established rules of law, the arguments against their change have specific force." *Thomas v. Washington Gas Light co.*, 12 BRBS 828, 835, 100 S.Ct. 2647 (1980) (plurality opinion). My colleagues have profferred no arguments to support a reversal of *Bulone*. Thus, I would find *Bulone* controlling and would hold employer liable for the cost of Dr. Pecson's services.

Additionally, I would find employer liable pursuant to Section 7(d) for the expenses incurred by claimant in treatment from all three physicians. For the reasons stated in my dissent in *Jackson v. Navy Exchange Service Center*, 9 BRBS 437, 440 BRB No. 77-374 (1978), I would hold that a claimant is not obliged to request authorization when the nature of his injury requires treatment, and employer has knowledge of the injury and neglects to provide care. In the instant case, the facts establish that the employer did not meet this burden.

Finally, I cannot subscribe to my colleagues' holding

that the timeliness issue of the physicians' reports "was properly before the administrative law judge. . . ." Majority Opinion, slip op. at 13. I am unable to assent to the majority's proposition that a bare allusion to a regulation constitutes the raising of a defense. On appeal, the employer attempts to excuse its failure to raise this issue below by maintaining that the administrative law judge "requested only brief references to the applicable statute and regulations in opening statements." Employer's Response Brief at 13. An examination of the record discloses no such request. Moreover, I hardly consider the opening statement of employer's counsel, consisting of ten transcript pages, as brief references to the statute and regulations.

I further object to the majority's premise that the employer's response to the administrative law judge's request for physicians' reports constitutes the raising of the untimeliness of said reports. In this letter, the employer does note that Dr. Schuster's report is dated three months subsequent to the date of the initial Treatment. However, the employer makes no mention of the physicians' reports of Drs. Pecson and Edelson. It is thus impossible for me to view this letter as an objection to the untimeliness of the reports of Drs. Pecson and Edelson.

I would further apply the Section 20(a) presumption to the issue of the timeliness of the physicians' reports. *See Jenkins v. Maryland Shipbuilding & Dry Dock Co.*, 6 BRBS 550, BRB No. 76-376 (1977), *rev'd*, 10 BRBS 1, 594 F.2d 404 (4th Cir. 1979). The employer had full opportunity at the hearing to establish the untimeliness of these reports. The employer failed to rebut the presumption by declining to present any evidence on this issue. The majority's approval of the administrative law judge's treatment of this issue is contrary to the interests of justice.

> Our mandate under the Act is to apply the terms of the [Act] in a principled fashion, striving to avoid 'harsh and incongruous results' whenever appropriate in light of the language and intent of the Act. . . . We must 'not construe the Act so as to enable [employers] to escape liability to persons entitled to recover for an admittedly compensable death by reading into it technical restrictions on the tolling of the filing period which are inconsistent with the purposes of the Act.'

Smith v. Aerojet-General Shipyards, Inc., 13 BRBS 391, 396, 647 F.2d 518 (5th Cir. 1981) *rev'g and remanding* 9 BRBS 225, BRB Nos. 76-346/A (1978) (Miller, dissenting) (citations omitted). *See also* my dissent in *Peterson v. Washington Metropolitan Area Transit Authority*, BRBS , BRB, No. 78-610 (June 11, 1981).

For the reasons stated herein, I would reverse the administrative law judge's denial of claimant's claim for medical expenses.

Julius Miller
Administrative Appeals Judge

Dated this 21st
day of September 1981

SERVICE SHEET

BRB No. 79-724: James R. Shahady v. Atlas Tile and Marble and Hartford Accident & Indemnity Company
(Case No. 79-DCWC-252) (OWCP No. 40-102454)

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APPENDIX I

In the Matter of	:	
JAMES SHAHADY	:	
Claimant	:	
v.	:	Case No. 79-DCWC-252
ATLAS TILE & MARBLE	:	
	:	OMCP No.
Employer	:	102454
HARTFORD ACCIDENT & INDEMNITY CO.	:	
Carrier	:	

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Before: ROBERT A. BRIGGS
Administrative Law Judge

DECISION AND ORDER

Pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.*, and the District of Columbia Workmen's Compensation Act, as amended, 36 D.C. Code 501 *et seq.*, a formal hearing was held before the undersigned in this proceeding. Transcript pages are referenced by the letter "T". The Employer/Carrier is hereinafter referred to as Respondent. All evidence and testimony has been carefully considered but to summarize herein would serve no useful purpose. Pursuant to directive (ALJ Ex.1), the parties have filed post-hearing submissions relating to attending physician's reports and any requests for medical care, which are received in evidence as Claimant Ex. 14 and Employer Ex. 11.

Based upon the entire record herein, including the stipulations of fact by the parties and evidence adduced, and from my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and order.

Both parties are subject to the Act and in compliance with applicable notice are filing requirements of Sections 12 and 13. On November 19, 1975 claimant tripped and fell, striking his left knee, with said injury arising out of and in the course of his employment as a marble mason, which work requires considerable kneeling (T. 59). Two days later, he was treated and released to return to work by the NE Industrial Clinic (Claimant Ex. 4). Although he continued to work, his left knee condition worsened, and *October 8, 1976* his employer referred him to Dr. Gibson, an orthopedic surgeon. Conservative treatment proved unsuccessful, and surgery was performed by Dr. Gibson on April 2, 1977. Claimant continued to see Dr. Gibson until

April 14, 1978 (Claimant Ex. 6). Compensation payments for temporary total disability were made from April 1 to May 30, 1977 (Claimant Ex. 12). Claimant is presently receiving compensation which is not in issue at this time (T. 4). Claimant returned to work in early June 1977 (initially as a truck driver and, on October 3, 1977, returned to his regular work) and continued to work without missing any time through at least April 14, 1978 (Claimant Ex. 6).

Preceding, during, and subsequent to the above medical care of Dr. Gibson, claimant was also treated by his family physician, Dr. Pecson, commencing about one week after the injury (Claimant Ex. 2 at p. 1) and continuing at least through April 1979 (Employer Ex. 8). Claimant's condition further deteriorated and on *June 23, 1978,* Dr. Pecson advised claimant's attorney that claimant was "barely able" to work and *would be hospitalized on June 25 for corrective surgery* (Claimant Ex. 5.). Claimant was admitted to Doctor's Hospital on that date and referred to Dr. Schuster, an orthopedic surgeon, who *operated* on claimant's left knee four days later on *June 29, 1978.* (Claimant Ex. 2 at p. 1, 2). A bill for $200 by Dr. Edelstein who assisted Dr. Schuster at the operation is also claimed-Claimant Ex. 8. Subsequent to the above surgery, claimant continued to see both Dr. Pecson and Dr. Schuster. In November 1978, Dr. Schuster admitted claimant to Doctor's Hospital (a period of 4 days) for non-surgical treatment of his left knee (T. 57).

Claimant had no problems with his *left* knee prior to November 1975 but has since experienced pain, swelling and stiffness which have required two operations. I conclude that both operations were necessary and causally related (directly or indirectly) to claimant's injury of November 1975. Aggravation of a pre-existing condition is

compensable and, in this respect, there is no conflict in the evidence. I credit the opinion of Dr. Gibson that "The degenerative arthritis which pre-existed . . . suffered some aggravation both by the patient's injury and surgery . . ." (Claimant Ex. 6; T. 78.). Dr. Schuster's opinion further corroborates the above (Claimant Ex. 9). Accordingly, I find claimant's injury (and any sequelae thereof-such as may have resulted from subsequent necessary surgery by Dr. Gibson and Dr. Schuster) to be compensable. Thus, any *future* medical expenses (medication to relieve pain, orthopedic braces, future surgery, if necessary) would be recoverable *provided* there is compliance with Section 7 of the Act.

Past medical expenses. In March 1976 (about 4 months after his injury and over two years prior to treatment and surgery by Dr. Schuster), claimant retained the services of counsel who filed the instant claim on March 31, 1976 (Claimant Ex. 13). The parties have stipulated that neither claimant or his counsel contacted the insurance carrier to request medical treatment (T. 89). With respect to *all* of the treatments by Dr. Pecson, Dr. Schuster and Dr. Edelstein and related hospital admissions, there has been no request by claimant to the employer or carrier for the *prior* furnishing of such services (also Claimant Ex. 14). In this respect, I find that an emergency situation did not exist herein (as noted, supra, claimant's attorney was advised nearly a week prior to surgery on June 29 - Claimant Ex. 5) but rather a slowly deteriorating condition over a period of nearly 3 years, culminating in claimant's operation on June 29, 1978. Although there was some unpleasantness between claimant and Dr. Gibson, I find that this does not constitute a refusal by the employer to provide further medical treatment, particularly in view of claimant's statutory right to a physician of his choosing. In this

respect, I find that claimant did not select Dr. Gibson, but that Dr. Pecson was his initial choice. As no request was made (and there was no emergency or refusal by employer), the claim herein for past medical expenses must be denied.

Athough claimant is entitled to an initial free choice of physician, Section 7(d) provides that he is not entitled to recover any medical expenses unless he has requested that employer "authorize provision of medical or surgical services *by the physician selected by the employee* and the employer shall have refused . . ." (emphasis added). Decisions of the 4th and 5th Circuit Court of Appeals in *Nardella* v. *Campbell Machine,* 525 F.2d 45, 3 BRBS 78 (1975) and *Maryland Shipbuilding v. Jenkins,* 549 F.2d 404, 10 BRBS 1 (1979) are dispositive. Also compare *Jackson v. Navy Exchange,* 9 BRBS 437, 439 (1978).

Although failure to request authorization requires denial, the claim is *additionally* denied because neither Dr. Pecson nor Dr. Edelstein have filed *the reports required by Section 7(d).* An Attending Physician's report filed with the Deputy Commissioner (but not the employer) by Dr. Schuster on September 25, 11978 (Employer Ex. 4 at p. 3) some *three months subsequent to initial treatment and surgery* does not comply with Section 7(d). Under the circumstances of this case, and considering claimant's representation by counsel since March 1976, I find no basis for excusing the failure of the respective attending physicians to properly submit the report(s) required by statute. CF. *Maryland Shipbuilding,* supra, 10 BRBS at p. 8. As Dr. Pecson was claimant's initial choice, subsequent medical services by Dr. Schuster and Dr. Edelstein are denied for the *additional* reason that written consent to change physicians was not obtained as required by 20 CFR 702.406.

As noted in *Nardella* and *Maryland Shipbuilding*, supra, although the Longshore Act is to be interpreted liberally, the plain terms of the statute may not be disregarded under the guise of liberal interpretation. Section 7(b) and implementing regulation at 20 CFR 702.407 *et seq. require* that the Deputy Commissioner *shall* actively supervise the medical care rendered to injured employees, including making determinations with respect to the necessity of medical care furnished or to be furnished, determinations with respect to change of physicians, the appointment (where appropriate) of impartial specialists to assist in resolving medical disputes based on differing medical evaluations, and the requiring of periodic reports as to the medical care being rendered. 20 CFR 702.422 provides that the employer/carrier is not liable even for authorized medical care unless the treating physician shall furnish, within 10 days of his first treatment, a report to the employer *and* to the Deputy Commissioner (failure to furnish such report may be excused when in the interest of justice to do so).

In the instant case, comprehensive procedures for the providing of appropriate medical care, supervised and monitored by the Deputy Commissioner, and for the resolution of any disputes concerning such care were thwarted by claimant's failure to apprise either the employer *or* the Deputy Commissioner of his decision to seek additional medical aid (also T. 38). As in *Maryland Shipbuilding*, supra, such failure is further exacerbated by the fact that claimant obtained legal advice shortly after the injury (and continuing) some two years prior to the initial treatment and surgery by Dr. Schuster. In the instant case, counsel for claimant has tried hundreds of cases under the Longshore Act, is knowledgeable as to its requirements, and had represented claimant in a prior com-

pensation claim (T. 88). Although claimant may obtain such medical care as he wishes without request or notification to anyone, such expenses are not chargeable to his employer under the Longshore Act unless the provisions of Section 7 are complied with.

Should medical treatment or surgery be deemed necessary in the future, claimant (or his counsel) is advised to forward a written request to the employer/carrier with a copy to the Deputy Commissioner. A written request for any future change of physician should be made to the Deputy Commissioner or, alternatively, to the employer.

ORDER

For the above reasons, the claim herein for medical expenses of Dr. Pecson, Dr. Schuster, Dr. Edelstein and any related hospital expenses is denied.

/s/

ROBERT A. BRIGGS
Administrative Law Judge

APPENDIX J

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 80-515

MARK W. LLOYD	)
Claimant-Petitioner	)
	)
v.	)
	)
SLATTERY ASSOCIATION, INC.	)
and	)
HARTFORD ACCIDENT AND INDEMINITY COMPANY	)
Employer/Carrier-Respondents	)

FILED AS PART OF THE RECORD
SEP 30 1982
Agnes Kurtz
Clerk
Benefits Review Board

DECISION and ORDER

Appeal from the Decision and Order of Robert J. Brissenden, Administrative Law Judge, United States Department of Labor.

Timothy F. X. Cleary (Ashcraft & Gerel), Washington, D.C., for the claimant.

William P. Dale (McChesney & Pyne), Washington, D.C., for the employer/carrier.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

MILLER, Administrative Appeals Judge:

This is an appeal by claimant from the Decision and Order (77-DCWC-11) of Administrative Law Judge Robert J. Brissenden pursuant to the provisions of the Longshoremen's and Harbor Worker's Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501 *et seq.* (hereinafter, the Act).

Claimant suffered a work-related back injury on October 30, 1975. In a Decision and Order dated April 1, 1977, claimant was awarded compensation and medical benefits under the Act. On April 5, 1978, the parties entered into a lump sum settlement of the compensation benefits. The settlement provided for future medical treatment related to claimant's injury.

Shortly after the injury, claimant consulted Dr. Hyde at the employer's clinic. Claimant was later referred to Dr. Gordon by Dr. Hyde. There is no dispute as to the claimant's right to be treated by either of these doctors. However, claimant became dissatisfied with Dr. Gordon's care and began undergoing treatment by Dr. Schuster on August 22, 1979.[1]

The administrative law judge found that claimant had not requested that employer authorize the treatment by Dr. Schuster as required by Section 7(d) of the Act. 33 U.S.C. § 907(d). The administrative law judge also found that Dr. Schuster failed to file a medical report within 10 days following the first treatment as required by Section 7(d). Accordingly, he denied the claim for medical expenses in regard to treatment by Dr. Schuster.

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[1]Additionally, the claimant visited Dr. Rida Azer on three occasions. There is also no dispute with respect to the right to consult this doctor.

Claimant contends that he is entitled to reimbursement for medical expenses because the employer effectively refused to provide medical treatment. Claimant further argues that, once the employer has refused medical treatment, it is not within the spirit of the Act to deny reimbursement for necessary medical expenses simply because claimant did not request further treatment. Finally, claimant argues that, based on *Buckhaults v. Shippers Stevedore Co.*, 2 BRBS 277 (1975), employer's refusal to authorize medical care negates the administrative law judge's finding that there was no justification for Dr. Schuster's failure to timely file his medical report.

Employer initially contends that the administrative law judge correctly determined that employer did not refuse to provide medical care. Moreover, employer argues that, even if Dr. Gordon had refused to provide further treatment, it should not be liable since Dr. Gordon was not the employer's doctor. Lastly, employer maintains that claimant has not shown good cause for Dr. Schuster's failure to timely file a medical report.

The Board must affirm a decision if the findings of the administrative law judge are supported by substantial evidence in the record considered as a whole, if they are rational, and if the decision is in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3).

As a general rule, an employer is responsible for furnishing medical services and supplies that may be required as the result of a work-related injury. *See* 33 U.S.C. § 907(a). Nevertheless, Section 7(d) provides in pertinent part as follows:

> An employee shall not be entitled to recover any amount expended by him for medical or other

> treatment or services unless he shall have requested the employer to furnish such treatment or services, or to authorize provision of medical or surgical services by the physician selected by the employee, and the employer shall hvae refused or neglectd to do so, or unless the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize the same; nor shall any claim for medical or surgical treatment be valid and enforceable, as against such employer, unless within ten days following the first treatment the physician giving such treatment furnish to the employer and the Secretary a report of such injury and treatment, on a form prescribed by the Secretary. The Secretary may, however, excuse the failure to furnish such report within ten days when he finds it to be in the interest of justice to do so, and he may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee.

Claimant does not contend that he requested authorization to consult Dr. Schuster or that he requested further treatment from Dr. Gordon. However, he argues that the actions of Dr. Gordon are sufficient to constitute a refusal of treatment. Case law establishes that, under certain circumstances, the actions of an employer's physician can be tantamount to a refusal by the employer to etiher provide treatment or to authorize treatment, thus obviating the need for claimant to request either treatment or authorization of treatment. When the actions of an employer are such that they are tantamount to a refusal, the claimant is thereby entitled to payment or reimbursement for any subsequently obtained necessary treatment. *See Altantic &*

Gulf Stevedores, Inc. v. Neuman, 440 F.2d 908 (5th Cir. 1971); *Rogers v. Pal Services,* 9 BRBS 807 (1978); *Walker v. AAF Exchange Service, 5 BRBS 500 (1977); Washington v. Cooper Stevedoring Co.,* 3 BRBS 474 (1976), *aff'd sub nom. Cooper Stevedoring of Louisiana, Inc. v. Washington,* 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977); *Buckhaults.* In *Washington,* the Board held that a mistaken diagnosis was equivalent to a refusal of treatment. 3 BRBS at 479.

In the instant case, Dr. Gordon and Dr. Schuster did not actually diagnose claimant's ailments differently. Each found back pain complicated by accompanying emotional problems. Their disagreement was with respect to the proper method of treatment. Nevertheless, we conclude that Dr. Gordon's actions are tantamount to a mistaken diagnosis, because the administrative law judge explicitly found that Dr. Schuster's treatment was reasonable and necessary and that his approach differed considerably from Dr. Gordon's. Thus, we find that claimant was refused treatment and incurred expenses for further necessary medical treatment. Claimant can recover the cost of this further treatment if the refusal of treatment is attributed to the employer. *See Shahady v. Atlas Tile & Marble Co.,* ____ F.2d ____, No. 81-1818 (D.C. Cir. June 4, 1982), *rev'g* 13 BRBS 1007 (1981) (Miller, J., dissenting); *Rogers, supra.*

In this case, the administrative law judge concluded that "[t]here was no evidence to indicate that Dr. Gordon was employer's representative." However, the record indicates that claimant was referred to Dr. Gordon by Dr. Hyde, the physician at the employer's clinic. Moreover, Dr. Gordon was called by employer as its witness. Therefore, we determine that the administrative law judge's conclusion that Dr. Gordon was not employer's representative is irra-

tional. Accordingly, we hold that Dr. Gordon's Refusal of treatment by virtue of misdiagnosis must be attributed to employer.

Finally, we must address claimant's contention that the refusal of treatment negates the administrative law judge's finding that there was no justification for Dr. Schuster's failure to timely file his medical report. In *Shahady*, the United States Court of Appeals for the District of Columbia Circuit held that, when an employer refuses to provide medical care, an administrative law judge's refusal to excuse a physician's failure to timely file his medical reports as required by Section 7(d) is an abuse of discretion. Accordingly, we hold that the administrative law judge abused his discretion by not excusing Dr. Schuster's failure to timely file his medical report.

For the foregoing reasons, the Decision and Order of the administrative law judge is reversed, and the case is remanded or an award of benefits.

SO ORDERED,

/s/ Julius Miller
Administrative Appeals Judge

I concur:

Robert L. Ramsey, Chief
Administrative Appeals Judge

KALARIS, Administrative Appeals Judge, concurring:

I am of the opinion that the decision of the District of Columbia Court of Appeals in *Shahady v. Atlas Tile Marble Co.*, ____ F.2d____, No. 81-1818 (D.C. Cir. June 4, 1982), *rev'g* 13 BRBS 1007 (1981), requires reversal of the administrative law judge's denial of medical costs in the case before us. *Shahady* controls the results herein because this claim, too, arises in the District of Columbia Circuit. I therefore concur in the result reached by my colleagues, However, I continue to disagree with the circuit court's opinion in *Shahady,* and herewith set forth my disagreement in the context of the case now before the Board.

The administrative law judge below determined that employer could not be deemed to have refused to provide claimant with treatment (which refusal would have eliminated the claimant's duty under Section 7(d) to request the services of another physician, Dr. Schuster) because of the actions of Dr. Gordon, employer's physician.[1] The administrative law judge below evaluated Dr. Gordon's actions in the light of *Walker v. AAF Exchange Service,* 5 BRBS 500 (1977), which held that, where an employer's physician makes a determination may be tantamount to a refusal by employer to provide care thus eliminating any duty on the part of the employee under Section 7(d) to request medical care. *See also Atlantic & Gulf Stevedores, Inc. v. Neuman,* 440 F.2d 908 (5th Cir. 1971). The administrative law judge found that, since Dr. Gordon's report and testimony were to the effect that,

[1]I fully concur in my colleagues' conclusion that Dr. Gordon is employer's physician on the facts of this case.

since Dr. Gordon's report and testimony were to the effect that emotional problems remained, Dr. Gordon did not deem claimant fully recovered; therefore claimant's duty to request that employer provide additional care would remain intact under the *Walker* rationale. In my view, the administrative law judge's conclusions on this point are supported by substantial evidence in the record and may not, therefore, be disturbed on appeal. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947).

The administrative law judge went on to conclude that an employee's simple dissatisfaction with the treatment and his disagreement on the state sof recovery, even if communicated to employer's doctor, would not be enough to constitute a request to employer for medical care. However, the opinion of the court in *Shahady*, appears to require a contrary result. In *Shahady*, an employer's physician had stopped treatment of the claimant (despite lack of recovery), which action the court equated with a "discharge" from treatment; the result was that the claimant's after-acquired medical care, since necessary and related to the industrial injury, was reimbursable by the employer. I see little to distinguish the case before us from the facts in *Shahady*. In the case before us, Dr. Gordon withheld the kind of treatment that Dr. Schuster later provided because Dr. Gordon did not believe that such treatment was necessary. The claimant, by Dr. Gordon's own admission, had nevertheless not recovered. As in *Shahady*, the administrative law judge below found that the treatment provided by Dr. Schuster was both reasonable and necessary. On these facts, I believe that the District of Columbia Circuit would, under *Shahady*, find an effective "discharge" in Dr. Gordon's actions, and, therefore,

would find an effective refusal on the part of employer to provide further medical treatment.[2]

In my view, a finding that Dr. Gordon's actions constitute a "discharge" from treatment is a legal fiction that obscures the reality of the case. I agree with the administrative law judge's characterization of the legal issue before us which is, simply, whether the requirements of Section 7(d) are met where an employee, who is dissatisfied with treatment or who disagrees with the state of his recovery, secures other medical treatment without request of the employer and that treatment is ultimately found to be necessary, and causally related to his employment injury. The plain language of section 7(d) requires an answer in the negative. The request must be made, followed by employer's refusal to provide care, unless the nature of the injury requires immediate medical treatment, that is, unless an emergency situation exists. *See Jackson v. Navy Exchange*, 9 BRBS 437 (1978); 20 C.F.R. §§ 702.405 and 702.421. Since no emergency situation existed in the case before us, the employee was required by statute to request treatment or authorization for treatment from employer. Failure to comply bars the employee's recovery of medical expenses by the plain language of Section 7(d). 33 U.S.C. § 907(d). It has often been said that, where "Congress has put down its pen, [the Court] can neither rewrite Congress' words nor call it back 'to cancel half a line.' " *Director, OWCP v. Rasmussen*, 440 U.S. 29, 47 (1979). For this reason, the Board is not empowered to create judicial exceptions to the prior authorization requirements of Sec-

[2]My colleagues achieve a similar result by finding that Dr. Gordon's actions constitute a "mistaken diagnosis," and, therefore, an effective refusal on the part of employer to provide further medical treatment. I cannot ascribe to this finding because Dr. Gordon did not diagnose claimant's ailments differently than Dr. Schuster.

tion 7(d) for the employee who is dissatisfied with his treatment and secures necessary treatment elsewhere.

With regard to the issue of the failure of Dr. Schuster to timely file the physician's report required by Section 7(d), I concur in the result reached by my colleagues because *Shahady* is controlling. My colleagues are correct that the D.C. Circuit held in *Shahady* that, when an employer refuses to provide necessary medical care, an administrative law judge's refusal to excuse the physician's failure to file his Section 7(d) report, where medical services are otherwise reimbursable, is an abuse of discretion. *Shahady*, slip op. at 4. Accordingly, the administrative law judge's refusal to excuse Dr. Schuster's failure to timely file his report is reversible error as a matter of law in the D.C. Circuit on the facts of this case. However, the D.C. Circuit's opinion on this issue is based on a mistaken premise.

The court stated in *Shahady* that its holding, that it is an abuse of discretion for the administrative law judge to refuse to excuse the failure to timely file the physician's report in the situation where the employer refuses to provide care, is compelled by the Board's own precedent in *Buckhaults v. Shippers Stevedore Co.*, 2 BRS 277 (1975). I do not agree. *Buckhaults* involved a situation where the administrative law judge refused to excuse the physician's failure to file his report because the administrative law judge believed that employer had not refused medical care. Since the Board held as a matter of law that the employer had indeed refused to provide medical care, the Board remanded in *Buckhaults* for the administrative law judge to reconsider excusing the failure to file the doctor's report in light of employer's refusal to provide care. *Buckhaults* does not hold, as the court in *Shahady* would say, that the administrative law judge must as a matter of

law excuse the failure to file the Section 7(d) report where employer has refused to provide treatment. Indeed, *Buckhaults* properly remanded the case for the administrative law judge to reconsider his conclusion, since the statute provides for excusing the failure to timely file the physician's report when it is "in the interest of justice to do so." 33 U.S.C. § 907(d); *and see* n20 C.F.R. § 702.422. Finding the Section 7(d) filing requirement excused is a discretionary act under the plain language of the statute and is not made mandatory by the single fact that employer has refused to provide medical care. For example, an administrative law judge may be confronted with a situation where a physician treated claimant's disease over a long period of time but never filed the report despite his knowledge that the illness was occupational in origin. Perhaps the physician was paid from other sources and the claimant may have had legal counsel during the period of treatment. Such facts would require a judgment as to whether it is in the interests of justice to excuse the failure to file, and that judgment is not pre-ordained, under Board law or under a fair reading of the statute, where the single factor of employer's refusal to provide care is present. Assuming, therefore, that there has been a refusal by employer in the case before us, Board law would require remand for reconsideration of the issue of excusing the physician's failure to timely file his Seciton 7(d) report. Because *Shahady* mandates reversal in the D.C. Circuit, however, I concur in the judgment of my colleagues.

ISMENE M. KALARIS
Administrative Appeals Judge

Dated this 30th day of September 1982

SERVICE SHEET

BRB No. 80-15: Mark W. Lloyd v. Slattery Association, Inc. and Hartford Accident and Insurance Co.
(Case No. 77-OWCP No. 4-99153)

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